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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 01 196 54230 Office: CALIFORNIA SERVICE CENTER Date: JAN 20 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center acting director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a private school that seeks to continue the employment of the beneficiary as a teacher of the Japanese language. Citizenship and Immigration Status (CIS) had previously approved H-1B classification status for the beneficiary to work in this position as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b), for the period October 12, 1998 to April 14, 2001.

The acting director denied the petition because she determined that the petitioner was late in filing the certified labor condition application (LCA) that pertains to the present petition.

On appeal, counsel files a brief and additional evidence.

The acting director based her decision on 8 C.F.R. § 214.2(h)(4)(i)(B)(1), which states:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupation specialty in which the alien(s) will be employed.

The record indicates that CIS had approved the beneficiary's H-1B classification under the previous petition for the period October 12, 1998 to April 14, 2001. The petitioner filed the present petition on May 7, 2001, which was after the expiration of the beneficiary's H-1B classification period. The petitioner submitted a copy of the certified LCA that pertained to the previously approved petition, but it did not submit one for the present petition. In response to a February 21, 2002 CIS request for a certified LCA for the employment period pertaining to the present petition, counsel submitted an LCA that had been certified by the Department of Labor on April 1, 2002 for the period April 15, 2002 through April 14, 2004. Accordingly, the acting director denied the petition, noting that the petitioner had not provided an LCA that had been approved by the Department of Labor before the petition was filed on May 7, 2001.

On appeal, counsel asserts that the late validity dates of the certified LCA was the fault of the Department of Labor's administrative processing:

> It is contended that due to failure by [the] U.S. Department of Labor, Employment Training and Administration in San Francisco, California to respond to the petitioners' [sic] request for a new, certified Labor Condition Application submitted on March 19, 2001, the petitioner was not able to submit a new, certified Labor Condition Application with the validity date commensurate with the intended continuation of employment in the present case.

Counsel asserts that the Department of Labor never responded to the original application for LCA approval and that, therefore, counsel had to resubmit another LCA application, which counsel did after receiving the acting director's February 21, 2002 request for "a new, certified LCA with the validity date commensurate with the intended continuation employment." Counsel submitted several documents with the brief, which will now be briefly discussed.

A June 7, 2002 letter from the Department of Labor office about which counsel complains explained that counsel's late filing of an LCA approval request was the reason for the Department's approving a later validity period than counsel had requested. However, the AAO notes that this letter appears not to relate to the present petition. The letter cites a different case number than that cited by the Department of Labor in its LCA certification for the present petition, and the letter refers to a date for the petitioner's LCA submission that postdates the Department of Labor certification on the LCA in the instant petition.

Counsel also submits a copy of a March 19, 2001 letter to the Department of Labor office about which counsel complains. The letter states that it has enclosed an original and one copy of a LCA for processing. Counsel does not provide a copy of the enclosed LCA. Counsel also submitted a copy of a certified mail receipt used to mail the March 19, 2001 letter. The receipt bears no postmark or other date information, however.

The AAO does not accord any persuasive value to the brief and its enclosures. In any event, counsel would not have prevailed even if the documents which counsel presents on appeal had substantiated that Department of Labor administrative processing played a material part in the LCA's deficiency. The petitioner is solely responsible for obtaining a certified LCA prior to filing a petition for H-1B classification.

The petitioner did not comply with the requirement at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) for an LCA certified by the Department of Labor for the period of employment for which the petitioner sought to continue the beneficiary's H-1B status. Therefore, the petitioner failed to meet a condition precedent to filing the H-1B nonimmigrant petition in this proceeding. Accordingly, the decision of the acting director will not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.